(2) *Yates* v. *Evans* (1892) 61 L.J.Q.B. 446.

CIVIL APPEAL.

Gan Teik Chee for the appellant.
Yeap Ghim Guan for the respondents.

Cur. Adv. Vult.

Mustapha Hussain J.C.: The appellant, a lending company, lent $5,000/= to the Respondent. The Respondent executed a Memorandum of Agreement for a loan (I.D.3) where the borrowers (the Respondents) and the Surety had signed, so also the Appellant signed it.

Earlier on the same day, the Respondent and the Surety had applied for the loan and the application was made by a formal application for a general loan.

The Memorandum (I.D.3) which was signed and executed on June 6, 1975 was stamped on June 7, 1975, one day after execution. The stamp duty paid was $22/=.

The Respondents/Borrowers defaulted in payments of instalments towards the loan and the Appellant filed a claim for the balance of $1,666.72¢ together with interest in the Sessions Court. The Appellant also brought in the Surety.

At the trial in the Sessions Court learned counsel successfully objected to the admissibility of this Memorandum of Agreement for a loan (I.D.3) saying that this instrument is a promissory note within the meaning of section 2 of the Stamp Ordinance No. 59 of 1949 and that it was not stamped in accordance with section 41 thereto. I.D.3 was stamped the next day after execution. Since the learned President upheld the objection, the appellant's claim was dismissed with costs.

The sole issue, both at the trial and in this appeal is whether I.D.3 (the Memorandum of Agreement) is a promissory note.

Prior to the execution of the Memorandum (I.D.3) the Respondent had applied for the said loan supported by the Surety. This form is a general application where the name of the borrower and the guarantor together with the amount applied for and the method of repayment is stated. This form is nothing more than the usual application for a loan which is not different from a verbal application.

The Memorandum I.D. 3 contained all the particulars of the loan, the method of repayment, the guarantee by the Surety (i.e. a promise to pay of a fixed sum) and it was signed by the borrower and guarantor (the Respondents here) and also by the Appellant. The question is whether I.D.3 is a promissory note or just an agreement of a loan.

It is clear law (*Alagappa Chettiar* v *Freedam Shah*)[1] that if there is a stipulation in the Memorandum apart from the promise to pay, then it is not a promissory note. To be a promissory note, there must be an unconditional promise to pay a certain sum and it must be in one entire instrument. It must be a promise to pay absolute and must not depend on a contingency or a stipulation.

In this appeal I.D. 3 the Memorandum contains this promise to pay and to pay a definite sum. This promise is not coupled with any stipulation or any contingency. It is a straightforward promise and the fact that an earlier application for the loan was made did not make it a contingency to this promise to pay. The fact that there is a clause where the surety will be liable if the borrower defaulted and that the lender could recall the balance of the loan at any time, are purely arrangements of the "promise to pay" and do not in any way affect the character of the promissory note. *Yates* v. *Evans*[2]

Therefore the appeal is dismissed with costs.

Appeal dismissed

Solicitors: *Gan Teik Chee & Ho; Yeap & Co.*

NG LEAN TEIK v. NG POH HUAT

[A.C.J. (Mustapha Hussain J.C.) December 1, 1981 & February 5, 1982]
[Penang – Civil Appeal No. 47 of 1980]

Damages – Quantum – Fracture of mandible - Award of $8,000 – Whether excessive.

This was an appeal by the appellant/defendant against the quantum awarded by the learned President. The plaintiff suffered (a) swelling on neck of mandibular region; (b) swelling on periorbital region; (c) abrasion on (L) elbow; (d) two abrasions on dorsum of (L) foot; (e) small abrasion on (L) ankle and (f) fracture of mandible bone. The learned President had awarded the plaintiff $8,000 as general damages for the said injuries.

Held, dismissing the appeal: the Court is of the opinion that though it may not be appropriate to refer to the Digest of Cases when making awards, and though the figure awarded is more than the trend, the award made is not

against the well laid down principles and that it is not that excessive as justify an interference.

Cases referred to:

(1) *Khoo See Moi* v. *Tay Teik Chang* [1970] 2 M.L.J. 249.

(2) *Wee Siaw Hong* v. *Lau Siew Tick & Anor.* [1979] 1 M.L.J. 232.

(3) *Yasin bin Wahab* v. *Loo Kok Wai* [1980] 2 M.L.J. 43.

(4) *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.

CIVIL APPEAL.

Lim Kean Chye for the appellant.

V. Muthusamy for the respondent.

Cur. Adv. Vult.

Mustapha Hussain J.C.: This is an appeal by the Appellant (who was the Defendant in the court below) against the quantum only awarded by the learned President.

The Respondent (Plaintiff in the court below) had claimed damages arising out of a motor accident on 30/7/76. The injuries suffered were:—

(a) Swelling on neck of mandibular region;

(b) Swelling on periorbital region;

(c) Abrasion on left elbow;

(d) Two abrasions on dorsum of left foot;

(e) Small abrasion on left ankle;

(f) Fracture of mandible bone.

Respondent was admitted to the Bukit Mertajam District Hospital on 30/7/76 and discharged on 10/8/76. Such are the bare facts that are pertinent to this appeal. The learned President after considering a number of authorities awarded $8,000/— as general damages. He also awarded the full amount of Special Damages as claimed. However this appeal is only against the award of $8,000/—.

In his grounds of judgment he stated "Taking into consideration the above authorities cited, but in particular, the particular injuries suffered by the Plaintiff, as the facts and circumstances of the cases cited are not identical, this court was of the view that a sum of $8,000/— was fair and reasonable compensation."

The learned counsel for the appellant contends that the award was too high and against the trend of awards handed down by the High Courts and the Federal Court for similar injuries. He contends that the cases cited to the learned President were made from the Digests of Cases which are shortened versions of the cases without full details of injuries and in particular the citations do not state residual disabilities. Learned counsel says that trial judges should not rely on Digests to guide them in awarding damages. Authorities were cited in support and this court is in full agreement with the contentions.

The learned President had taken into consideration the three cases cited from the Digests and not from full cases and had awarded $8,000/— as general damages for the injuries. The main injury to the Respondent was a fracture of the right mandible bone and there is no evidence Respondent has any residual disability.

The cases cited by the learned counsel for the appellant to show the trend of awards for mandible fracture with residual disabilities are:—

(1) In *Khoo See Moi's* case[1] – fracture of mandible with loss of 12 teeth and residual effect of inability of chewing properly, the award was $5,000/—;

(2) In *Wee Siaw Hong* v. *Lau Siew Tick & Anor.*[2] The Federal Court awarded $8,000/— not only for the fracture of mandible but also including fracture of tibia with residual disability.

(3) In *Yasin bin Wahab* v. *Loo Kok Wai*[3] the court awarded $7,500/— for the fracture of the mandible.

The trend, it would seem, ranges round about $7,500/— to $8,000/— for fractured mandible with residual disabilities. In the present case there is no evidence of residual disabilities and the award for general damages should have been less than $8,000/— as suggested by the learned counsel for the appellant. From the grounds of judgment the learned President had stated "*for injuries suffered by the Plaintiff*" and it is clear the award was meant not only for the fractured mandible but other injuries as well.

In an appeal against quantum the test is laid down in *Davies* v. *Powell Duffryn Associated Collieries Limited*[4]. Adopting this test this court is of the opinion that though it may not be appropriate to refer to the Digest of Cases when making awards though the figure awarded is more than the trend, the award made is not against the well laid down principles and that it is not that excessive that would justify an interference.

The appeal is therefore dismissed.

No costs.

Appeal dismissed

Solicitors: *Lim Kean Chye & Co., V. Muthusamy & Co.*

CHE WIL v. MAHMOOD BIN ISMAIL

[A.C.J. (Mohamed Zahir J.) March 18, 1982]
[Kota Bharu – Civil Appeal No. 7 of 1981]

Road Traffic – Liability – Fatal road accident – Absence of lights – Breach of statutory rules – Whether breach evidence of negligence – Road Traffic Rules 1959, r. 35(1).

The respondent as representative of the deceased's estate claimed that the deceased was pedalling a trishaw towards the direction of Pasir Mas on the day of the accident. A witness saw the deceased carrying a torchlight in his hand and the torchlight was on. The trishaw had no lights but had two reflectors on each side of the rear wheels. The deceased was knocked down by a car driven by the appellant. The learned magistrate found the appellant liable and he appealed. He argued that the deceased had contravened Rule 35(1) of the Road Traffic Rules 1959.

Held, dismissing the appeal: (1) breach of the Rules is not in itself evidence of negligence on the part of the person concerned;

(2) the appellant in this case had no excuse to knock the trishaw from behind. He was wholly liable for the accident.

Cases referred to:

(1) *Clarke and wife* v. *Brims* [1947] K.B. 497.
(2) *Coote* v. *Stone* [1971] 1 W.L.R. 279.

CIVIL APPEAL.

Dato' H.L. Wrigglesworth for the appellant.
C. Jegathesan for the respondent.

Cur. Adv. Vult.

Mohamed Zahir J.: The appellant appealed to this court against the decision of the learned Magistrate. I dismissed the appeal. He now further appeals.

The case for the respondent was that the deceased was just before the accident at about 10.15 p.m. pedalling a trishaw towards the direction of Pasir Mas. PW1 heard the sound of collision and he turned to see a car knocking the trishaw driven by the deceased. He saw the deceased carry a torchlight in his hand and the torchlight was on. The trishaw had no lights but had two reflectors on each side of the rear wheels.

The evidence for the appellant was that he saw a trishaw in the middle of the road. Then the accident took place. The reason as to how the accident took place, as given by the appellant, was that at that time there was a car coming towards him and he could not see the trishaw earlier. He further stated at that time he could not see anything in front of him. He dimmed his light and he suddenly noticed the trishaw but it was already too late.

The learned Magistrate in his judgment referred to the brake marks of the appellant's car which was very close to the side table. He stated if the appellant was a careful driver he would not have driven close to the side road. The learned Magistrate further referred to the admission of the appellant in his evidence when he stated he could not see anything ahead of him.

The main reason for the appeal was that the deceased had contravened Rule 35 of the Road Traffic Rules 1959 which reads as follows:

"35. Between the times of sunset and sunrise vehicles, other than motor vehicles, shall in the case of –

(1) Every vehicle other than a bicycle carry two lighted lamps one on either side of the vehicle. The lamps shall exhibit a white light to the front in the direction in which the vehicle is proceeding or is intended to proceed and shall show the full width of the vehicle. These lights may be fitted with a red disc visible from the rear. If such lights are not fitted with red discs or if the red disc of either of the lights is obscured, the vehicle shall carry a lighted lamp on the off-side of the vehicle exhibiting a red light to the rear."

I am of the opinion however that breach of the Rules is not in itself evidence of negligence on the part of the person concerned. The question that has to be decided is who is negligent. The deceased might have contravened the said Rule 35 but was he to be blamed for the accident? Supposing it was a bicycle with reflectors being pedalled by the road side, one would have thought that the motorist would be equally blameable if he were to knock into the rear of the bicycle. The trishaw in this case had reflectors although it is slightly wider than a bicycle.

Further, in this case there was evidence that the deceased was carrying a lighted torch. Even if, for the sake of argument, he had no such light there was no excuse for the appellant to knock into him in the rear as the appellant's car is obliged under the law to be equipped with sufficient lights